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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-857

EUGENE TED BORING,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California

DAVID JAY MORGAN,
520 South El Camino Real,
San Mateo, California 94401,
Attorney for Petitioner.

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Petitioner prays that a writ of certiorari issue to review a verdict issued in the Superior Court of the State of California, in and for the County of Sacramento, which verdict was affirmed in the Court of Appeal of the State of California. The California Supreme Court denied a petition for a hearing.

OPINIONS BELOW

A copy of the verdict in the trial court is printed in Appendix A. A copy of the opinion of the Court of

Appeal of the State of California is printed in Appendix B. The summary order by the California Supreme Court denying a hearing is printed in Appendix C.

JURISDICTION

The order denying a hearing by the Supreme Court was filed on 24 September 1975.

This Court has jurisdiction pursuant to Rule 19 1(a) of Rules of the Supreme Court of the United States.

QUESTION PRESENTED

At the insistence of the District Attorney, and pursuant to an arrangement whereby charges filed against one Ferguson for robbery in the first degree with the use of a firearm would be reduced to second degree robbery with no allegation of the use of a firearm and said Ferguson's wife would not be charged with any crime whatsoever, said Ferguson telephoned to petitioner immediately before appearing at a preliminary hearing. He gave permission for that conversation to be tape recorded by the District Attorney. At the inception of the conversation petitioner inquired whether Ferguson was calling from a pay telephone. Ferguson assured him that the call was made from a pay telephone while he was on his way to work.

At the trial, and over the timely objection of petitioner, the tape recording was introduced into evidence and played before the jury.

The question herein presented is whether or not petitioner's rights under the Fourth Amendment have been violated as those rights were enunciated in *Katz v. U.S.* (1968), 389 U.S. 349, 91 L.Ed.2d 576, there being no search warrant or court order previously obtained.

STATEMENT OF THE CASE

James Mikel Ferguson was arrested by the Police Department of Chico, California, and was charged with first degree robbery with the use of arms concerning the robbery and attempted robbery of the Chiapella and Meline residences in Chico, California. In the course of the police investigation it was determined that he was responsible for other robberies in Visalia. A deal was arranged with the District Attorney that in exchange for Ferguson's implication of petitioner as an alleged co-conspirator and as an alleged receiver of stolen property (no claim ever being made that petitioner partook in either robbery or attempted robbery), those charges would be dropped against Ferguson, and he would be charged with second degree robbery with no allegation of being armed, his wife would not be charged with any crime, and no further charges would be levied against him for the Visalia robberies (R.T. 47-48)*.

Prior to attending court for the preliminary hearing and in the District Attorney's office in Chico, Cali-

---

*All references to the Reporter's Transcript and Clerk's Transcript shall be designated "R.T." and "C.T." respectively, followed by the page number. A colon will then separate the page designation from the line designation.

fornia, Ferguson telephoned to petitioner. This call was recorded on a tape recorder by the Chico Police Department and the District Attorney's office with the consent of Ferguson (R.T. 33:1-23). No search warrant was obtained and no prior court order permitting the call was issued.

The following discussion occurred at the commencement of the telephone conversation:

> "Boring: Where are you now?
> Ferguson: I am on my way back to work.
> Boring: Oh, Jesus Christ, I, we was hoping you'd come by.
> Ferguson: Yea, they were watching pretty close. I figured I'd better stay away.
> Boring: Hey, you know, I found out a lot of things, you're on a pay phone now, aren't you?
> Ferguson: What?
> Boring: Pay phone, or something?
> Ferguson: Yea. . . . ." (C.T. 281.)

A complete transcript of the entire telephone conversation is set forth in Appendix D.

Defendant's objections to the introduction of the tape recording into evidence were overruled. (C.T. 280-281; R.T. 38:28.)

Petitioner did not testify at his trial, and therefore, offered no testimony to explain or interpret some of the apparently inculpatory remarks contained in the tape. The trial judge, on several occasions, expressed his opinion that it was the import of the tape that was most singularly responsible for petitioner's conviction (R.T. 640, 721:1-4).

REASONS FOR GRANTING THE WRIT

The judgments below should be reviewed because fundamental constitutional rights of petitioner were violated by the introduction into evidence of the tape recording which proximately resulted in his conviction of major crimes.

Katz v. U.S. (1968), 389 U.S. 349, 91 L.Ed.2d 576, pronounced a new definition and interpretation of the Fourth Amendment rights against unlawful search and seizure. In that case the defendant was suspected of placing interstate telephone calls from a certain telephone booth during which he made wagers. In order to obtain evidence against him the F.B.I. planted a recording device on the top of the telephone booth. In ruling that that evidence violated Katz' Fourth Amendment rights, this Court stated as follows at page 351:

> ". . . The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection . . . but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .
>
> "The government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth, was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his call from a place where he might be

> seen. No less than an individual in a business office, in a friend's apartment, or in a taxi cab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place the call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. . . .
>
> "They were not required, before commencing the search, to present their estimate of proximate cause for detached security by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they required after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. . . .
>
> "Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause . . . for the constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. . . ."

The only logical explanation that can be made of the colloquy between petitioner herein and Ferguson regarding whether or not Ferguson was making the telephone call from a pay telephone was so that petitioner could evaluate whether it was reasonable to expect that the conversation would be recorded.

There have been numerous cases decided since *Katz,* supra, which have held that a defendant takes his

chances when talking to another person that that person may thereafter relate the conversation to the police authorities or may even be an undercover agent. The leading pronouncement of this theory is found in *U.S. v. White* (1970), 401 U.S. 745. In that case White talked to a government agent, Jackson, who had equipped on his person a radio transmitter. This was monitored by government agents. Jackson was unavailable at the trial and the agents conducting the surveillance were permitted to testify. This Court upheld the introduction of that evidence on the following basis, at page 747:

> "The court of appeals read *Katz v. U.S.*, 389 U.S. 347 (1967) as overruling *On Lee v. U.S.*, 343 U.S. 747 (1952), and interpreting the Fourth Amendment to forbid introduction of the agents' testimony in the circumstances of this case. Accordingly the court reversed, but without adverting to the fact that the transactions at issue here had occurred before *Katz* was decided in this court. In our view the court of appeal misinterpreted both the *Katz* case and the Fourth Amendment, and in any event erred in applying the *Katz* case to events that occurred before that decision was rendered by this Court."

At page 749 the Court states:

> "*Katz* involved no revelation to the government by a party to conversations with the defendant nor did the court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police."

Page 751:

> "If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received by the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks. . . .
>
> "Very probably individual defendants neither know nor expect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. . . ."

No case, including *U. S. v. White,* supra; *Rathbun v. U. S.,* 355 U.S. 107; *Hoffa v. U. S.,* 385 U.S. 293, or *Lopez v. U. S.,* 373 U.S. 427, or any other case decided by this Court, contains facts similar to the instant case in which a specific inquiry was made to determine the circumstances of whether or not it was reasonable to expect the conversation to be recorded. In fact, it can only be assumed that if Ferguson, in the instant case, was truthful to petition herein and told him that the conversation was being made at the office of the District Attorney and that upon the conclusion of the telephone call that he was going into Court on a preliminary hearing on reduced charges, no conversation would have taken place.

18 U.S.C. 2511.2c, The Omnibus Crime Control and Safe Streets Act of 1968 provides as follows:

> "It shall not be unlawful in this chapter for a person acting under color of law to intercept a

> wire or oral communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

Section 633, California Penal Code, likewise makes it permissible for certain designated law enforcement officers to intercept a telephone conversation if one party to the conversation has consented thereto.

Quite clearly, Ferguson was acting as an agent of the District Attorney's office at the time the telephone call was being made, as otherwise, under California Penal Code §§631 and 632, the consent of both parties to the conversation would be required. As an agent of the District Attorney and under the holding of *Katz v. U.S.,* supra, Ferguson had a duty to be truthful and not to deceive the petitioner so that petitioner could evaluate what expectations were reasonable by virtue of the conversation.

In *Lopez* and *Rathbun,* supra, the conversation being intercepted actually constituted the substantive crime. In the instant case that was not the fact, and the entire conversation was planned for the sole purpose of getting the petitioner herein to make damaging statements.

In *Williamson v. U. S.,* 405 U.S. 1026, Justice Douglas, in a dissenting opinion to an order denying a writ of certiorari in a case involving facts similar to those herein involved (with the exception that no inquiry was made concerning the circumstances of the conversation to determine if it was being recorded), stated as follows:

"As I have discussed before, electronic eavesdropping early crept into our law as a means of combating fifth column activities during war time. Later, it was said that this weapon was essential in the battle against organized crime. Now we learn that the omnipresent electronic ear is stalking the hill country in search of moonshiners. Apparently no suspect is too unimportant to escape its reach. . . ."

At page 1029:

"Although the problem is enormous and a recurring one, our decisions have not articulated a coherent response. Ironically, if petitioner James Williamson had confided in a genuine confederate rather than a spy, there would be no doubt that the warrantless seizure of his telephonic communications would have offended *Katz v. U. S.*, supra. It was said, however, by a plurality in *U. S. v. White,* 401 U.S. 745, that speakers must assume the risk that their confidants may tattle, and therefore, they should assume the further risk that every word they utter will be instantaneously fed into a recorder. Yet there is a significant qualitative difference between electronic surveillance and conventional police stratagems such as eavesdropping and disguise. *Lopez v. U. S.,* 373 U.S. 427, 465, dissenting opinion. That chasm cannot be bridged simply by invoking the conclusory proposition that one must assume the risk of being subjected to electronic surveillance. Under that reasoning we might also have held that Katz should have assumed the risk that his telephone booth was bugged. Obviously citizens must bear only those threats to privacy which we decide to impose.

> "The ruse employed by the government in this case has still a further offensive characteristic. Here the agents had the opportunity not only to destroy a petitioner's privacy, but to interrogate him in a clandestine fashion without the warnings required by *Miranda v. Arizona,* 485 U.S. 436, without the assistance of counsel and without knowledge that every word he spoke would be replayed to a court. Yet under the plurality reasoning in *White,* such deception is permitted. Thus both *Katz* and *Miranda* can be circumvented through the simple expedient of injecting a secret agent into a suspect situation."

In *Hudson v. U. S.,* 402 U.S. 965, a case similar in its facts to *Williamson v. U. S., supra,* Justice Douglas, in a dissent to an order denying a writ of certiorari, said:

> "Perhaps the court denies certiorari because any claim under the Federal Communications Act was eliminated in *Rathbun v. U. S.,* 355 U.S. 107. But it is time we re-examined that decision under the Fourth Amendment because of the increasing surveillance under which we all live.
>
> "In *Katz v. U. S.,* 389 U.S. 347, 359, we said 'wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.' Yet in these cases all the episodes were prearranged, and in spite of ample time to obtain warrants, none were sought.
>
> "I dissent from the doctrine that an individual begins to lose his constitutional rights the minute he answers the telephone.

"Though I dissented in *U. S. v. White,* 401 U.S. 745, 756, the Court emphasized that where there was connivance of one party to a conversation who wears the recording device, the search could not be considered unreasonable. But here a third person, not a party to the conversation, is the interceptor. Thus does the law grow imperceptibly but surely toward creating in this nation the totalitarian type of surveillance we profess to abhor."

CONCLUSION

The conversation here involved took place because the petitioner was deceived as to the circumstances of the telephone call after he made a specific inquiry. This deception was accomplished by an agent of the prosecutor. By virtue of the deception petitioner could reasonably expect that the conversation would be confidential. The introduction of the tape recording into evidence violated his Fourth Amendment rights against unlawful and unreasonable search and seizure as those rights have been defined in *Katz v. U. S.,* supra. Therefore, this petition for a writ of certiorari should be granted.

Dated, San Mateo, California,
December 10, 1975.

DAVID JAY MORGAN,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

Superior Court of the State of California
In and For the
County of Sacramento

Date, November 1, 1973, Court met at 10:00 a.m.
Department No. 12

Present Hon. Irving H. Perluss, Judge
F. Searle, Deputy Clerk
P. Hopper, Reporter
T. Clark, Bailiff

People of the State of California,
v.
Eugene Ted Boring,

Counsel:
Will Mattly, Deputy Dist. Atty.
Darrel Stevens

Nature of Proceedings:
Jury Trial—Violation 211 PC—Eleventh Day

The above entitled matter came on regularly this day for further trial before the jury, the defendant and counsel appearing as heretofore indicated. The twelve jurors and one alternate were all present and in their respective places.

The jurors again retired to deliberate at 10:12 a.m. At 11:15 a.m., they returned to the courtroom for the rereading of instructions they had requested, and again retired to deliberate at 11:32 a.m. At 2:35 p.m. they returned to the courtroom in the presence of the defendant and both counsel with the following verdicts:

Superior Court of the State of California
For the County of Sacramento

People of the State of California, Plaintiff, v. Eugene Ted Boring, Defendant.	No. 43333

We, the Jury in the above entitled matter, find the Defendant Eugene Ted Boring Guilty of the Crime of Robbery in the Second Degree, a violation of Section 211 of the California Penal Code, a felony, as charged in Count I, of the information.

Dated: November 1, 1973
/s/Ralph T. Braun, Foreman

Superior Court of the State of California
For the County of Sacramento

People of the State of California, Plaintiff, v. Eugene Ted Boring, Defendant.	No. 43333

(Continued)

MINUTES

Book 317

This minute order was duly entered in R/A and a copy placed in the file.

Attest: W. N. Durley

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Sacramento.

People v. Boring

County Clerk M.O. 4 Action No. 43333

By F. Searle, Deputy.

11/1/73

The annexed instrument is a correct copy of the original on file in my office.

Attest: Dec. 11, 1975

Certified

J. A. Simpson, County Clerk and ex-officio Clerk of the Superior Court in and for the County of Sacramento, State of California.

By J. Meyers

Appendix B

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District
(Sacramento)

3 Crim. No. 7510
(Super. Ct. No. 43333)

The People of the State of California,
Plaintiff and Respondent,
vs.
Eugene Ted Boring,
Defendant and Appellant.

[Filed July 28, 1975]

OPINION

Defendant, tried by a jury and convicted of robbery (Pen. Code, § 211), conspiracy to rob (Pen. Code, § 182), and receiving stolen property (Pen. Code, § 496), appeals from an order suspending execution of sentence and granting probation and from an order denying his motion for new trial.[1]

[1]A new trial was granted defendant on an additional count of conspiracy to rob, upon which count the jury had returned its verdict of guilty.

Eight contentions are submitted on appeal:

(1) The conspiracy was not proved by substantial evidence;

(2) The court erred in its instructions as to Joy Ferguson;

(3) The court erred in its instructions re extra-judicial admissions;

(4) A tape recording, obtained without defendant's knowledge, was improperly made and admitted into evidence;

(5) Convictions for both robbery and receiving stolen property (the same property that was taken in the robbery) are not permissible;

(6) Defendant's trial counsel denied him his right to testify;

(7) Suppression of evidence by the prosecution deprived defendant of due process; and

(8) The prosecution's knowing use of perjured testimony violated defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution.

Our review of the lengthy record and of defendant's lengthy brief demonstrates that, except for the fifth, defendant's contentions are without merit.

The evidence supporting the convictions is summarized as follows:

James Mikel Ferguson lived in Paradise, California. He was a carpet and linoleum installer. Defendant hired Ferguson to put linoleum into a bathroom in defendant's bar.

Defendant told Ferguson that he had information that there was "a safe full of money" at the residence of Ann Chiapella in Chico. He also told Ferguson that he (defendant) was in financial trouble as he had bought a bar in Redding and a large check he had put into escrow had no funds behind it. The two men discussed how much money might be in Mrs. Chiapella's safe. Mrs. Ferguson overheard this conversation. Defendant estimated the amount at $30,000. They discussed various ways in which a robbery of the safe could be committed. They considered disguising themselves as telephone repairmen and breaking into the house if no one was home, or entering with guns and committing outright robbery. Defendant told Ferguson that he could "fence" any jewelry they got. He gave Ferguson a .44 caliber revolver which was later used in the robbery.

Defendant drew pictures of the house to indicate to Ferguson the location of the safe. Ferguson called David Toy, his friend from Visalia, to help with the robbery. Ferguson told Toy that defendant was in on the planning but would not participate in the actual robbery.

On the night of February 17, 1973, Ferguson and Toy went to the Chiapella residence. They knocked on the door and a girl answered. Ferguson pulled out the .44 caliber gun and pushed her into the living room. The two men told her it was a robbery and asked if there was anyone else home. She said her younger sister was asleep in the bedroom. The men tied up the younger girl. The older girl gave them

the combination to the safe from which they took a variety of gold and silver coins. They then tied up the older girl also, ripped out the phone, and drove back to Ferguson's house. The next day, February 18, 1973, Ferguson took the coins to the Nashville West bar and gave them to defendant. Some of those coins were later taken by defendant to John Kranz, a stamp and coin dealer in Chico.

Ferguson was arrested for the Chiapella robbery on April 22, 1973. He implicated defendant.

I

In asserting the first contention, defendant initially relies upon two premises. These are that (1) the testimony of James Ferguson is so internally inconsistent and was so thoroughly impeached that no portion of it remains competent, and (2) Joy Ferguson, being married to Ferguson, is obviously an accomplice; and therefore her testimony is not available to corroborate any other testimony.

While James Ferguson was not an ideal witness, our review of the record discloses that his testimony was not so replete with material contradictions as to be inherently incredible. Whether his testimony was believable or not was for the trier of fact to decide. As to Joy Ferguson, as will be noted below, the most that can be said is that she *may* have been an accomplice. The jury was instructed regarding this possibility and regarding its duties if so found. Her marriage to Ferguson did not make her an accomplice as a matter of law. It was only a circumstance for

the jury to consider. Substantial evidence was present to support the determination that she was not an accomplice.

Defendant also inferentially makes the argument that there was no evidence of an actual agreement between defendant and James Ferguson. The criminal agreement which is the gravamen of the crime of conspiracy is frequently not susceptible of direct proof and must often be inferred from the facts and circumstances of the case. Here the evidence showed that defendant suggested the crime, provided both the means and information to carry it out with others, and arranged for and obtained a share of the proceeds. The foregoing statement of facts demonstrates ample evidence of all essential elements. This conduct provided a sufficient basis for the determination that defendant was a conspirator. (People v. Fain (1971) 18 Cal.App.3d 137, 143-144.)

II

Defendant contends that the Court erred in failing to instruct the jury that Mrs. Ferguson was an accomplice to the Chiapella robbery and conspiracy as a matter of law. A request by the defense for such instruction was denied. The jury was so instructed in regard to the crime of receiving stolen property (because of her admitted appropriation of a white sweater taken from the Chiapella home and her involvement in the sale of the coins); but, as to the remaining crimes, the jury was directed to itself determine whether she was an accomplice, and, if so, to view her testimony with the appropriate caution.

Mrs. Ferguson testified to having heard her husband and defendant discussing their intention and decision to effect a robbery of the Chiapellas. She also testified that she helped the two men find Mrs. Chiapella's address in the phone book. This much of her testimony was corroborated by her husband. But there was evidence to show that she so assisted them prior to learning that they sought this information for criminal purposes. Mrs. Ferguson was away from home at the time of the robbery, returning afterwards to find the loot on her kitchen table. She also at that time had Toy as a guest of her husband in her home. Her probable liability as an accessory after the fact and her complicity in the receiving of stolen property may not be elevated retrospectively to transform her into an accomplice and co-conspirator as a matter of law.

At trial, defense counsel maintained the posture that Mrs. Ferguson's testimony involving defendant was fabricated as vengeance for his refusal to post bail for her husband upon his arrest for these crimes. Her credibility, in its totality, was thus in issue. The issue was resolved by the jury in favor of the People. There was no error. (People v. Jones (1964) 228 Cal.App.2d 74, 94-95.)

III

The trial court gave CALJIC 2.72, which states: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of an admission made by him outside of this trial.

"The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. Such identity or degree of the crime may be established by an admission."

Defendant argues that this instruction is inadequate where one of the crimes charged is conspiracy, and also where multiple crimes are charged. We disagree. By utilizing that instruction the Court met its obligation to instruct on the relevant general principles. (People v. Sedeno (1974) 10 Cal.3d 703, 715.)

IV

Challenges are made (1) to the recording by law enforcement personnel of a conversation between Ferguson (then in custody for these crimes) and defendant, in which defendant made statements indicating that he had knowledge of the crimes and had participated in their planning, and (2) to the admission into evidence of the tape thereof.

It is first argued that defendant had a reasonable expectation of privacy when he talked to Ferguson on the phone (evidenced by his initial question to Ferguson in which he assured himself that a pay phone was being used), and therefore, under Katz v. United States (1967) 389 U.S. 347 (19 L.Ed.2d 576), that the tape may not be used against him. The facts that Ferguson consented to the recording and that defendant freely talked to Ferguson knowing that Ferguson was free to repeat the conversation are ignored by defendant. Those facts totally refute any

basis for exclusion on this ground. (Rathbun v. United States (1957) 355 U.S. 107, 2 L.Ed.2d 134; Evid. Code, §§ 1204, 1220.)

Defendant also argues that his statements on the tape were highly equivocal and were far more rationally consistent with his noninvolvement than they were with criminal participation and knowledge. From this he draws the conclusion that any probative value the conversation may have had—and he does not concede that it had any—was more than outweighed by its prejudicial character. While the defendant could have made much more inculpatory statements than he did, it does not follow that the tape had no evidentiary value. *The balancing of these factors was for the trial court.* No abuse of discretion has been shown.

The argument is also made that admission of the tape deprived defendant of his right to remain silent at trial. There is no merit to the contention.

V

It is submitted by defendant that in no case is it proper to convict one of both the robbery and receiving counts where the stolen property is that taken in the robbery. Defendant misapprehends the law. Such double conviction is valid where there is some factual separation between the robbery and the receiving or concealing. Whether such factual separation exists, however, is a question of fact for the trier thereof, and the jury should be appropriately instructed. The jury was not so instructed in this case,

and for that reason the section 496 conviction may not stand. (People v. Wheeldin (1969) 276 Cal.App.2d 744, 747-748; People v. Tatum (1962) 209 Cal.App.2d 179, 183-184.)

VI

One of the major grounds urged by defendant upon his new trial motion was that he was prevented by his counsel from taking the stand on his own behalf. Affidavits were submitted by defendant, his wife, and his mother. They refer to defendant's willingness and desire to take the stand and counsel's strong advice that defendant not do so. They do not, however, aver that defendant was told he had no right to testify.

A large portion of the discussion of this issue upon motion for new trial consisted of praise for the competency of trial counsel voiced both by the court and new counsel, with the one qualification by new counsel that he disagreed with trial counsel's "strategic decision" not to place defendant on the stand. Strategic decisions by trial counsel will not be second guessed by an appellate court. To sustain this contention would allow a defendant a second shot at trial if the initial defense strategy is unsuccessful.

The defendant's right to testify in his own behalf "must be exercised with caution and good judgment, and with the advice and under the direction of competent trial counsel. It necessarily follows that a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-

incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial." (People v. Mosqueda (1970) 5 Cal.App.3d 540, 545.) On the other hand, "if a defendant does not testify at his trial because of some misconception on the part of his lawyer, his . . . complaint is that he was denied effective representation . . ." (Ibid, p. 546.) Defendant has made no showing that his failure to testify was the result of any such misconception on the part of his counsel.

The case of People v. Robles (1970) 2 Cal.3d 205, fails to support defendant's argument. There defendant took the stand over his counsel's objection. On appeal it was argued that it was error to have allowed defendant to testify. The court rejected the claim, reaffirming a defendant's right to testify upon timely demand. (Id., at pp. 214-215.) Defendant here appears to seek an extension of this rule to a point that trial counsel should refrain from active control of the case. Such a rule would be most improper.

VII

Police reports and testimony at the hearing on defendant's motion for new trial revealed that the weapon carried by James Ferguson during the Chiapella robbery belonged to his wife Joy and was turned in by her along with the Chiapella girl's sweater upon police request. At some point after trial proceedings, return of the gun was sought by her. Defendant argues that this information was known to the pros-

ecution and was suppressed by it in violation of the rule declared in the case of In re Ferguson (1971) 5 Cal.3d 525, 531-533.)

The record does not support this contention. Testimony of the conspirators at trial contained repeated references to the two weapons. Defendant had ample opportunity to obtain and develop the issue of Joy's ownership of the weapon. There is no obligation upon the prosecution to present at trial all evidence it has, only that which it determines to be relevant to and necessary for its case.

The record also fails to support the further contention that the prosecution withheld from the defense a tape recording of a police interview with one Ron Jack.

The final argument made in regard to suppression of evidence is to this effect: since Joy Ferguson, James Ferguson, and defendant are so important to this case, tap recorded interviews *must* have been held. No such tapes were furnished to the defendant. Therefore, suppression has occurred. To state the argument is to demonstrate its fallacy.

VIII

Defendant's final argument is premised upon sheer conjecture. The record reveals marked inconsistencies in the testimony of the major witnesses, such inconsistencies existing both within and between their respective testimonies. We are then told that axiomatically, since they cannot all be telling the truth, some of them must be lying. And since the district attorney

knew what they were going to say and the discrepant natures thereof, he was guilty of knowingly using perjured testimony. This argument, which has universal applicability in the presence of conflicting evidence on one side of any litigation, is obviously without merit.

The judgment (order) as to counts I (robbery) and II (conspiracy) is affirmed, together with the order denying new trial. The judgment (order) as to count III (receiving) is reversed.

Paras, J.

We concur:

Puglia, P.J.

Janes, J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
September 24, 1975
I have this day filed Order
Hearing Denied
In re 3 Crim. No. 7510
People

vs.

Boring
Respectfully,
G. E. Bishel
Clerk

Appendix D

TRANSCRIPT OF TELEPHONE CONVERSATION

Boring: Yeah.

Ferguson: This is Jim.

Unidentified Female: Hello.

Boring: Yeah.

Ferguson: Gene?

Boring: Yeah.

Ferguson: Gene, this is Gene . . .

Boring: Who are you now, Gene or Jim?

Ferguson: Jim. God, I don't know, my old lady's got me all screwed up.

Boring: Where are you now?

Ferguson: I'm on my way back to work.

Borng: Oh, Jesus Christ, I, we was hoping you'd come by.

Ferguson: Yeah, they were watching pretty close, I figured I'd better stay away.

Boring: Hey, you know, I found out a lot of things, you're on a pay phone now, aren't you?

Ferguson: What?

Boring: Pay phone or something?

Ferguson: Yeah.

Boring: You know, like she starts out on anything on that phone up there. I told her, I said you can't, I know, she'd be start talking a bunch of stuff, you know.

Ferguson: Yeah.

Boring: You know, I even didn't say anything on that phone.

Ferguson: Yeah, you know, she got kind of upset because you know, they had me in jail. She figured you were supposed to go my bail.

Boring: Yeah, brother, she, she was way out there and then when I went down to the jail and I found out I didn't know this guy Toy was in there.

Ferguson: Well, they said they arrested him on Thursday or something like that.

Boring: Yeah, Thursday, and boy, you see now, I got to talking to Chops and man, she just, she just set out a whole bunch of stuff. So man, there was nothing I could do, I tell you, Jim, they have been watching you. Let me ask you, how did they come about to pick up Toy?

Ferguson: I don't know.

Boring: I don't know either.

Ferguson: Hey, I found, you know, that place I'm working for down there?

Boring: Mm-hmm.

Ferguson: There's a coin collector right next door to me and I was talking to him.

Boring: Mm-hmm.

Ferguson: You know, and I asked him about that $50 gold piece.

Boring: Mm-hmm.

Ferguson: And I, he told me that thing was worth nothing but money.

Boring: Well, I had a guy look at it and he said he'd give me $75.

Ferguson: Well, this guy down there told me he'd give me $190, bam, just as fast as I'd bring it in.

Boring: $190?

Ferguson: Yeah.

Boring: I doubt it.

Ferguson: Well, that's what he said. He's pretty highly, I guess he's a pretty big coin collector.

Boring: Did you tell him it was a Mexican gold piece?

Ferguson: Yeah.

Boring: Well, son-of-a-gun. Boy, they must be worth something then.

Ferguson: It is.

Boring: Because heck, you can buy them right down here in this coin shop cheaper'n that.

Ferguson: Yeah, well, that's what it is. Well, anyway, what I wanted to talk to you about, they've got so far from what I've seen on evidence. Remember the .44 you gave me?

Boring: Yeah.

Ferguson: Now they've got it. They picked it up down there.

Boring: Where'd they get it from?

Ferguson: They got it from that guy I sold it to.

Boring: Did you sell it?

Ferguson: Well, remember when they picked up Toy, Toy told everything.

Boring: Oh, no.

Ferguson: Yeah.

Boring: What did he tell?

Ferguson: He told them the whole thing on Chiapella. Everything all the way through from the time I called him all the way down the line.

Boring: Did he tell them where you got the information?

Ferguson: No, I don't think he mentioned your name, Gene.

Boring: He didn't even know that, did he?

Ferguson: No, just that one time I took him in and introduced him to you. He doesn't know you're involved in it.

Boring: Well, I know, now, what throwed a little suspicion on me is because I didn't see them but they came out by the house so, uh, but I haven't seen anyone yet, but that's how they work, you know, they don't say nothing, you know. What's that . . .

Ferguson: That's why I figured it would be better if I stayed away.

Boring: What's the matter with this Toy guy?

Ferguson: I don't know. Anyway, I talked to some guys on the phone last night and I called down south cause I'm going to be hurting for money and I told them about Meline up there and we just may go ahead and get him.

Boring: Well, you better get her done.

Ferguson: Well, if we get him, will that guy take the gold right then?

Boring: Oh, yeah.

Ferguson: Can, can you get rid of it that fast?

Boring: You mean that day?

Ferguson: Just as fast as we can get the money.

Boring: Oh, you betcha.

Ferguson: OK, cause it will have to be cash 'cause these guys will have to get back down south.

Boring: Yeah. Well now, now, I will tell you something. Now, now, there is no way, Jim, unless, now I'm going to ask you something. Is there anyone up on the hill know anything about that?

Ferguson: No.

Boring: Well then, how in the devil could they have put these pieces together?

Ferguson: I don't know. Hey, you know . . .

Boring: Now let me tell you what Chops told me. That you have been watched all the time.

Ferguson: Chops, who is Chops?

Boring: Well now, don't say anything 'cause (inaudible word) now this is good for me but that Chops is the gal who works, takes all the calls and everything.

Ferguson: Mm-hmm.

Boring: In from the . . .

Ferguson: What, the P. D.?

Boring: Yeah.

Ferguson: You're kidding. Well you know, I remembered you said . . .

Boring: She's the one that was going out with George.

Ferguson: Oh, is that the one?

Boring: Mm-hmm.

Ferguson: Well, I was thinking that was the one because you said she held back them warrants on George.

Boring: That's the one.

Ferguson: I wish she would've held some back on me.

Boring: Yeah, well, she doesn't know anything, and so after talking to her and seeing how the situation was, in fact, I called Joy and told her, you know, I guess she told you, I don't know, but someone it sounds like to me, someone had to spring with some information somewhere.

Ferguson: Well, I imagine it was Toy when they picked him up.

Boring: Well, what did they pick him up for?

Ferguson: Investigation of the Chiapella robbery.

Boring: Well, how did they happen, yeah, but where'd they ever get any idea?

Ferguson: Well, I don't know but they got us charged with First Degree Robbery.

Boring: I know.

Ferguson: And Burglary and everything else.

Boring: You bet, you know what she said? That they have positive identification.

Ferguson: Yeah, that's what our lawyer told us, the girls can identify us just, boom, right down the money.

Boring: Well, I don't know, no telling what this guy said. Is he still in jail?

Ferguson: Yeah, Toy is still in there.

Boring: Good Lord. When do you go up for a hearing?

Ferguson: Well, we're supposed to go up sometime today, this afternoon, I imagine, so I have got to go down there and pick up my check and come back.

Boring: What do you mean, you guess, you're supposed to know?

Ferguson: Well, unless our lawyer can get it put off. He is going to try and get it put off for a week.

Boring: Brother, I have been, is that that Mueller, isn't it?

Ferguson: Yeah.

Boring: I notice that he is sure being used a lot lately.

Ferguson: Yeah, well he is the public defender.

Boring: I hope he puts all of your, your, his effort into your case.

Ferguson: So do I.

Boring: Well, I don't see how that, that, they are going to make a positive identification.

Ferguson: Well, you know, I don't know. Well, maybe you're right, maybe we should have killed them.

Boring: Naw.

Ferguson: Do you think we should've, anyway, hey, I'm going to have to get to work, Gene. I'll call you later, OK?

Boring: OK, bye.

Ferguson: OK, be good.

(End of tape)

Appendix E

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District
(Sacramento)

3 Crim. No. 7510
(Super. Ct. No. 43333)

The People of the State of California,
Plaintiff and Respondent,
vs.
Eugene Ted Boring,
Defendant and Appellant.

[Filed Aug. 18, 1975]

OPINION

BY THE COURT:

Appellant's Petition for Rehearing is denied.

Dated, Aug. 18, 1975.

Janes, Acting P.J.